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No. 93-661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WHITE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

WHITE CONSOLIDATED INDUSTRIES, INC., and JOHN DOE(S),
Petitioners,

vs.

THE BLAW KNOX RETIREMENT INCOME PLAN, BLAW KNOX PENSION PLAN, BLAW KNOX IAM PENSION PLAN, BLAW KNOX EQUIPMENT PENSION PLAN, BLAW KNOX DURALOY PENSION PLAN FOR SALARIED EMPLOYEES, BLAW KNOX DURALOY HOURLY PENSION PLAN and FIDUCIARIES DEAN G. WILSON and RICHARD A. McINTYRE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

Respondent the PBGC, seeking to narrow the impact of the decision below, repeatedly characterizes the issues presented to the Court as "fact-specific." The PBGC's contention is simply wrong. The Third Circuit reached a purely legal conclusion. It held that, as a matter of statutory interpretation, a transaction transferring sponsorship of an underfunded pension plan

"becomes effective" for purposes of ERISA §1369 not on the date of the closing of the sale transaction, but at some later date when the company that transferred the plan no longer makes substantial pension contributions. App. 14 ("We hold that a transaction does not become effective for purposes of section 1369 until the company that transferred a pension plan no longer makes substantial pension contribution"). In so holding, the Third Circuit announced a new rule of law that, contrary to Respondent's claims, will have a wide-ranging impact on corporate asset sales, spin-offs, and business divestitures that contemplate any kind of post-closing economic dealings between buyer and seller.

1. At this stage, the facts relating to WCI's September 27, 1985 sale of the Blaw Knox Businesses and the accompanying transfer of plan sponsorship to Blaw Knox Corporation ("BKC") are not in dispute.[1] Nor is the fact that in 1985, WCI contractually committed to make five annual $4 million payments to BKC, which ended on September 15, 1990.[2] What is disputed -- and what the Third Circuit resolved -- is the statutory definition of the term "becomes effective." If our view of the term is correct (and the transaction became effective on the date of sale and transfer), then the present action comes too late. If the court of appeals' view is correct (and the transaction became effective only on the date of the final payment), then the

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1 The allegations of the PBGC'S amended complaint have been accepted as true for purposes of WCI's motion to dismiss.

2 Because these facts are not in dispute, determination of the proper interpretation of § 1369 is a clear-cut issue of law that is fundamental to the further conduct of this case. A reversal of the Third Circuit's interpretation of the statutes at issue will result in a final judgment of dismissal. Review at this stage is thus proper despite the fact that the court of appeals remanded the case. *See Land v. Dollar*, 330 U.S. 731, 734n.2 (1947); R. Stern, *Supreme Court Practice*, 224-25 (6th ed. 1986) (citing cases).

present action is timely. This is a pure matter of statutory construction, not a question of fact.

The PBGC offers no defense of the Third Circuit's analysis. It does not even try to justify the court's disregard of the normal, ordinary meaning of "becomes effective" in the context of selling a business. *See* Pet. 16-18. As a matter of statutory analysis, the fact that businesses may enter into agreements that require future performance does not mean that Congress used the term "becomes effective" in other than its generally accepted sense (*i.e.*, the closing date). Yet the Third Circuit gave no other reason for concluding that there was an ambiguity requiring resort to legislative history. This was particular error in light of this Court's directive in *Mertens v. Hewitt Assocs.*, ____ U.S. ____, 113 S.Ct. 2063, 2077 (1993), to enforce ERISA provisions according to "the words of the text," rather than resorting to legislative history to discover a legislative "purpose."

The Third Circuit's use of legislative history, like its resort to it in the first place, is undefended by the PBGC, which now concedes that the Third Circuit based its ruling on an incorrect finding that Congress intended to codify the rule of predecessor liability stated in *In re Consolidated Litig. Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F. Supp. 512 (N.D. III. 1988), a decision rendered more than two years after § 1369's enactment. PBGC Br. in Opp. at 8, n.8. The PBGC attempts to justify the Third Circuit's incorrect statutory interpretation by citing to a House Report that itself cites no law for the proposition that "under current law," predecessor sponsors may be liable after transferring an underfunded plan. *Id.* However, the PBGC itself admits that the only cases dealing with the issue of predecessor liability were not decided until 1988 and 1991 -- years after enactment of §1369. Thus, at the time of § 1369's enactment, there was no "current law" for imposition of predecessor sponsor liability. The court of appeals' conceded error highlights the dangers inherent in reliance on legislative history, rather than on the statutory text, and further justifies review by this Court.

The PBGC also has no answer for -- indeed, it misconstrues -- WCI's retroactivity argument, which does not present an issue separate and apart from the statutory-construction question presented, but is simply a further basis showing why the Third Circuit's interpretation of § 1369 is wrong. It is a fundamental precept of statutory interpretation that statutes should not be interpreted to apply retroactively absent a clear indication of congressional intent. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). The Third Circuit's interpretation of "becomes effective" extends §1369's retroactive effect to apply to contractual obligations which the Third Circuit specifically held were fixed long prior to the statute's effective date. App. 16. Congress explicitly declared that §1369 was to be retroactive, but only to January 1, 1986. Pub. L. No. 99-272, §11013(b), 100 Stat. 261 (1986) 29 U.S.C. §1369. The fact that the Third Circuit's interpretation of "becomes effective" leads to plainly unauthorized retroactive application of the statute is yet another indication that the court below has failed to heed settled principles of statutory interpretation in its construction of §1369.[3]

2. The PBGC attempts to cast this case as fact-specific to avoid admitting the importance of resolution of the issues raised in this Petition. Bereft of its boilerplate, the PBGC's

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[3] It is settled law that applying statutory provisions to obligations contractually fixed prior to a statute's enactment is a retroactive application of the statute, even though discharge of those obligations occurs after the statute's enactment. *Commissioner of Internal Revenue v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) (contractual obligation to transfer assets became fixed in 1931, one year before enactment of the federal gift tax, 26 U.S.C. §1000(a); assets were then transferred in discharge of that contractual obligation in 1936 and 1944; court held that to apply gift tax to the transfers would require a retroactive application of the statute, contrary to Congress's explicit statement of nonretroactivity).

opposition reveals an important reason for granting the writ: future plan sponsors must attempt to structure transactions with reference to the court's interpretation of §1369. *See* PBGC Br. in Opp. at 5-6. The decision below will affect all of the numerous transactions involving divestitures of divisions with underfunded plans. That alone undermines any claim that the Third Circuit's holding is limited to the PBGC's attempt here to impose over $80 million in predecessor sponsor liability on WCI.

Indeed, the Deputy Executive Director of the PBGC, in a recent public address, has trumpeted the importance and wide-ranging impact of the Third Circuit's decision. *See* Remarks of Nell Hennessy, Deputy Executive Director and Chief Negotiator, Pension Benefit Guaranty Corporation, at the ABA National Conference of Bankruptcy Judges, Oct. 19, 1993. The Deputy Executive Director, after specifically noting that "the Third Circuit recently held that the 5 year period with respect to a former plan sponsor does not begin until the former sponsor no longer makes substantial pension contributions to the plan," warned plan sponsors that the PBGC will now be examining transactions "closely" to determine whether the PBGC can attempt to assess liability under §1369. *Id.* at 4-5.

The PBGC's attempt to portray predecessor sponsor liability as a rarely raised issue is misleading. Although the PBGC has only rarely actually litigated the scope of predecessor liability, the PBGC has become increasingly aggressive in intervening in corporate divestitures or spin-offs involving underfunded pension plans prior to their consummation. *See* Washington Post, Nov. 30, 1993, at D3 (discussing PBGC pre-consummation intervention in corporate transactions). The PBGC has capitalized on the uncertain scope of its enforcement powers to intervene in transactions precisely when they are most vulnerable. By merely threatening to employ its expansive interpretation of its enforcement power, the PBGC has extracted extra-statutory concessions from sponsors who are seeking to transfer underfunded plans and has undoubtedly inhibited other pension plan transfers in a manner inconsistent with ERISA policy. *See* Pet. at 5-6.

The Third Circuit's extension of the five-year safe harbor contained in §1369 will give the PBGC unwarranted leverage in intervening in corporate divestitures and will create significant uncertainty for sponsors who are considering business sales or spin-offs. That uncertainty will in turn deter plan sponsors from developing financing methods that will allow companies to sell divisions with underfunded plans to third parties as going concerns, rather than terminate the plans and liquidate the divisions, laying off employees and frustrating the congressional policy of fostering and maintaining pension plans.

While these claims may not be frequently litigated, the scope of predecessor sponsor liability has a powerful impact on the PBGC's enforcement activities, and therefore, on what types of transactions plan sponsors will enter into, as well as how those transactions are structured. Review by this Court is necessary to restore certainty to this important area of federal law.

CONCLUSION

In light of Respondent's inability to address the legal issues presented in the Petition, the need for review by this Court is manifest. For these reasons, and those stated in the Petition, review should be granted.

DATED: December 7, 1993

Respectfully submitted,

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